84-1576

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ALEXANDER L. STEVAS,
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No.

In the Supreme Court of the United States

October Term, 1984

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner

v.

EARNEST EARLY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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COUNTER-STATEMENT OF QUESTION PRESENTED

Petitioner's statement of the question presented incorrectly assumes the existence of facts which are contrary to the determination made by the trial court. The incorrectly assumed facts are whether the police officer opened the door "for his own safety" and whether such was done "to determine if a cohort is hiding in the vehicle". Further, such was not the question presented to the Michigan courts. The following counter-statement of the question is the one which was presented to the Michigan courts.

QUESTION I

WHETHER THE TRIAL COURT ERRED IN SUPPRESSING THE EVIDENCE IN THIS CASE?

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COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete and inadequate because it completely ignores the testimony at the preliminary examination, and also because it incorrectly summarizes the testimony at the evidentiary hearing. Petitioner, however, correctly recites the procedures and rulings in the Michigan courts, and hence this counter-statement only concerns itself with the record testimony.

At the preliminary examination Kermit Peters, a Pontiac patrolman, testified that on August 5, 1981 (18 months earlier), he was assigned to a Pontiac suveillance unit working with the Michigan State Police and the FBI in connection with a 1½ year investigation of an auto theft conspiracy ring. (2a-3a) He began surveillance of one Ira Flashner at approximately 6:00 a.m. that day at the Ramada Inn, Southfield. Respondent arrived in his truck at 12:56 p.m. Respondent and Flashner were observed together, and both left, Respondent in the pickup truck, and Flashner in a red van. (3a-4a) They ultimately arrived at the Pied Piper Restaurant, Waterford, where Flashner was to pay $100,000 in cash to an undercover agent to purchase "stolen" auto parts. Respondent in his pickup truck followed the red van to the Pied Piper Restaurant parking area, where in Respondent's presence Flashner gave a suitcase full of money to an undercover officer. The parties left the restaurant, and went to Attic Storage Vault, Waterford, for the purpose of getting the parts involved in the transaction. When they entered onto the Attic Storage Vault premises a signal was given, the officers converged, and both Respondent and Flashner were arrested. Respondent had been under continuous observation by Officer Peters. Eight policemen were present. (4a-6a)

When Respondent was arrested he was approximately 15 feet from his pickup truck. Officer Peters went over to the pickup truck, opened the driver's door, and observed the butt of a handgun on the floor of the truck protruding from under the driver's seat. (6a-8a)

During the surveillance of the vehicles officer Peters had a view of one person in each vehicle. (10a) He stated that the reason he opened the door of the truck was to see if there were other people in it, and it was based on a concern for his safety and that of the other officers. (10a) Peters also observed Respondent stop at a coffee shop, and Respondent was the only individual in the truck at that time. (11a)

Officer Peters acknowledged he could have looked into the vehicle without opening the door to see if there were other humans in there. (12a)

At the evidentiary hearing held May 5, 1983, Officer Peters again testified along the lines of his testimony at the preliminary examination. He stated the investigation was of individuals obtaining parts from the large auto companies and shipping them around the country. (E 3) He stated that although he could see Respondent's truck, he could not tell how many people were in it. (E 5) He described Respondent's truck as a 4 wheel drive pickup with monster mudder tires on it, with the driver's side window approximately 5 feet from the ground, so that just looking into the truck you would not be able to see if there was anybody crouched down in it, although Peters was 5'11" tall. (E 7, E 10) He reiterated that after Respondent and Flashner were arrested Peters was concerned about the safety of officers, and that Respondent's "vehicle could contain subjects inside that could conceivably have weapons". (E 7) Peters affirmed that Respondent's truck had been under continuous surveillance from approximately 12:00 noon until after the arrest, and that at no time did officer Peters see anybody else in the truck. (E 9) Nor did any other officers report seeing anyone in the truck besides Respondent. (E 11)

Respondent also testified at the evidentiary hearing. He is the owner of Broadway Motor Sales in which name the truck was registered, and was not its sole driver. He had 27 employees. (E 12-14) He denied owning the gun, or knowing that it was in the truck. (E 15) He had never been charged by the United States. (E 14)

REASONS FOR NOT GRANTING THE WRIT

Introduction

Petitioner seeks to overturn the trial court's finding that a handgun was illegally seized and as a consequence should be suppressed.

> "The general rule under both the Michigan and United States Constitutions is that searches conducted without a warrant (without the prior approval of a judge or magistrate) are unreasonable. [citations omitted] Exceptions to the rule are narrowly and carefully drawn and the burden is on those seeking the exception to show the need for it." *People* v *Reed* 112 Mich App 693, 695, 317 NW2d 228 (1982).

In other words, to justify the warrantless search in the present case, Petitioner must clearly establish "that the exigencies of the situation made that course imperative". *Coolidge* v *New Hampshire*, 403 US 443, 445, 91 S Ct 2022, 29 L Ed 2d 564 (1971).

In order to reverse the trial court's decision to suppress the handgun on the basis that the warrantless search was unreasonable under the circumstances, the Petitioner must also meet the heavy burden of showing that the finding was "clearly erroneous". *People* v *Young*, 89 Mich App 753, 763, 282 NW2d 211 (1979) cert den 445 US 927; *People* v *Terrell*, 77 Mich App 676, 679, 259 NW2d 187 (1977).

Finally, special regard must be given to the trial court's opportunity to evaluate and judge the credibility of Officer Peters whose testimony was offered by Petitioner to justify the warrantless search. *People* v *Burrell*, 417 Mich 439, 448-449, 339 NW2d 403 (1983); *People* v *Westerfield*, 71 Mich App 618, 623, 248 NW2d 641 (1976).

In an effort to have the order suppressing the handgun overturned, Petitioner contends that the warrantless search and seizure should be upheld under either of 2 recognized exceptions. The first exception is the "plain view" doctrine, and the second is the "search incident to arrest" doctrine. Respondent submits that the facts and circumstances present at the time of the search as determined by the trial court do not form a sufficient basis for justifying this search under either of these exceptions. Consequently, the trial court was factually and legally correct, and cannot by any stretch of the legal imagination be said to have been "clearly erroneous".

(1) "Plain View"

Petitioner first seeks to justify the warrantless intrusion into Respondent's truck and seizure of the handgun under a somewhat distorted application of the "plain view" doctrine. There are several implicit limitations on this doctrine which Petitioner has not sufficiently addressed, and which preclude its application under instant facts and circumstances.

The foremost of these limitations is that "plain view *alone* is never enough to justify the warrantless seizure of evidence". *Coolidge* v *New Hampshire, supra,* 403 US, p 468 (emphasis in original).

> "For the plain view doctrine to apply officers must rightfully be in a position from which the evidence is visible, there must be a prior justification for the officers' intrusion and discovery of the evidence must be inadvertent." *People* v *Johnson,* 81 Mich App 70, 76, 264 NW2d 125 (1978).

In order to justify the initial intrusion, it must be established that there is probable cause for a belief that sufficient exigent circumstances exist to justify the warrantless search. As succinctly set forth in *People* v *Dugan,* 102 Mich App 497, 503, 302 NW2d 244 (1980), cert den 455 US 927;

> " * * * there is no need for a warrant if the police *also* have probable cause to believe that an immediate warrantless search is necessary to (1) protect the officers or others, (2) prevent the loss or destruction of evidence or (3) prevent the escape of the accused. [citations omitted] The rationale of the exception is clear; when the police have the probable cause necessary to secure a warrant, but circumstances make it impossible to obtain the warrant in time, then it is 'reasonable' under the Fourth Amendment to conduct a search and to seize evidence or contraband." (emphasis supplied)

Petitioner relies on the first of these enumerated exigent circumstances (protection of the officers) in an attempt to legitimize the warrantless search. Petitioner alleges that the truck was entered to ascertain whether there were any other occupants who might have presented a danger to the officers. *The trial court, however, factually determined that Petitioner did not establish probable cause* upon which to form a belief that there could be anyone in the truck.

This finding is not clearly erroneous. It is supported by the evidence, and is clearly demonstrated by review of the testimony of Officer Peters. At both the preliminary exam and the evidentiary hearing, Peters testified that on August 5, 1981, he had Respondent and his truck in constant surveillance from approximately 12:00 noon until the time of Respondent's arrest. Inasmuch as the "transaction" did not take place until after 2:00 in the afternoon, and inasmuch as Respondent was arrested even later, this surveillance clearly continued over a considerable length of time. In fact, Officer Peters stated that he observed Respondent exit from and get back into his truck on two occasions prior to the arrest, and that he again observed Respondent get out of the truck one final time at the storage facility where the arrest was made. Peters then testified that during this extended period of close observation and surveillance, he did not at any time observe anyone inside the truck other than Respondent. In fact, Peters positively stated that when Respondent got out of his truck at the coffee shop, Respondent was the only person in it.

As a result, the trial court was well justified in finding that there was no probable cause to believe that any other "subjects" were in Respondent's truck at the time of the warrantless search by officer Peters. Respondent contends that if proper and due regard is given to the trial court's opportunity to observe and evaluate Peters' testimony, this finding cannot be held to be clearly erroneous. Inasmuch as

there was no probable cause for believing that another individual was inside the truck, there cannot be said to have been exigent circumstances present to justify the search on that basis.

> "The exigent circumstances allowing immediate [warrantless] search of a movable vehicle is an exception to the Fourth Amendment's warrant requirement. It does not serve to discharge the antecedent necessity of probable cause. Only when there is probable cause to believe that contraband [or in this case another individual presenting danger to the officers] will be found at the time the search occurs, will the exception catalyze permissible investigation of the auto's content without the procurement of a warrant." *People* v *Young*, 89 Mich App 753, 760-761, 282 NW2d 211 (1979), cert den 455 US 927.

In addition to lack of probable cause, it should be pointed out that the trial court specifically found that officer Peters could have looked inside the truck without opening the door to ascertain whether other persons were inside. This statement lends additional support to the court's ruling, and in fact suggests that the intrusion into the vehicle was made for purposes other than those articulated by Petitioner and its witness.

Inasmuch as the trial court's finding was supported both by fact and by law, and inasmuch as Petitioner has not met its burden of justifying the search under a legitimate application of the "plain view" doctrine, the order suppressing the handgun from evidence must stand.

(2) "Search Incident to Arrest"

In their remaining argument, Petitioner seeks to justify the warrantless intrusion into Respondent's truck as a search incident to arrest. As with the "plain view" doctrine, the Petitioner has again failed to meet its legal burden of justifying the search and demonstrating that the trial court's finding was "clearly erroneous".

The leading United States Supreme Court case which established the requirements for a valid, warrantless search incident to arrest is *Chimel* v *California*, 395 US 752, 89 S Ct 2034, 23 L Ed 2d 685 (1969). There police sought to justify a warrantless search of an entire house when defendant was arrested immediately upon entering his home. In rejecting the prosecution's contention that articles were lawfully seized throughout the house and in desk drawers or other closed or concealed areas in the room in which defendant was arrested, the court clearly defined the limitations on a valid search incident to arrest as follows:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officers' safety might be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary item must, of course, be governed by a like rule. A gun on the table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person *and the area 'within his immediate control' — construing that phrase to mean the area*

from within which he might gain possession of a weapon or destructible evidence." 395 US, 762-763 (emphasis supplied).

The question presented to this court, therefore, is whether the trial court was clearly erroneous in finding that the search of the vehicle by officer Peters was not a valid search incident to arrest inasmuch as the vehicle could not be said to have been in the area within Respondent's immediate control.

As correctly observed by the trial court, and as officer Peters testified, at the time of the search Respondent had been arrested and was "secured" or in the custody of other officers at the scene of the arrest. Prior to the search, Respondent had been so secured at a distance of approximately 15 feet from his truck. Respondent's truck could not be deemed to be under his immediate control in such circumstances. As a matter of fact, it is reasonable to assume that the entire area was under the control of the police at the time of Respondent's arrest, inasmuch as 8 officers were present and involved in the incident. As a result, Petitoner's argument does not satisfy the requirements for a valid search incident to arrest under either Michigan or federal law.

Petitioner, however, seeks to justify the search pursuant to the holding of *New York* v *Belton*, 453 US 454, 101 S Ct 2860, 69 L Ed 2d 768 (1981). But the circumstances existing at the time of the search in the present case do not call for application of *Belton*.

In *Belton*, a single state police officer stopped a speeding car containing 4 male occupants. During his initial questioning of the occupants, the officer discovered that none of the men owned the vehicle, observed the smell of burning marijuana coming from the interior of the auto, and obersved an envelope marked "Supergold" on the floor which he associated with marijuana.

The officer, therefore, directed the men to get out of the car, placed them under arrest for possession of marijuana, searched them individually, and searched the interior of the vehicle. During the search of the vehicle, he discovered cocaine in defendant Belton's jacket. Defendant sought to suppress the cocaine as the result of an illegal, warrantless search.

The United States Supreme Court specifically held as follows:

> "* * * when a policeman has made a lawful custodial arrest of an *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 US, p 460 (emphasis supplied).

Belton is factually inapplicable, and therefore not controlling here in several important aspects.

Exceptions to the warrant requirement of the Fourth Amendment are to be narrowly construed. *Arkansas* v *Sanders*, 442 US 753, 759-760, 99 S CT 2586, 661 L Ed 2d 235 (1979); *Coolidge* v *New Hampshire, supra*, 403 US, pp 454-455. Each of the few jealously and carefully drawn exceptions to the warrant requirement must be "strictly tied to and justified by the circumstances which rendered its initiation permissible". *Terry* v *Ohio*, 392 US 1, 19, 88 S Ct 1868, 20 L Ed 2d 889 (1968).

The holding in *Belton* is limited to allowing police to search a vehicle when the actual occupant thereof has been validly arrested. In the present case, Respondent was not an occupant of the vehicle when arrested. He was secured and taken into custody 15 feet or so away from the vehicle that was subsequently searched without warrant. The circum-

stances highlight another difference between the present case and *Belton*, to-wit:

> "* * * the 'search' was conducted by a lone police officer who was in the processs of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick search to confirm his suspicions before attempting to transport them to police headquarters * * *." 453 US, p 457.

The factual differrences are obvious. In *Belton*, the 4 occupants of the vehicle were ordered out after a police officer lawfully stopped them and observed drug paraphenalia inside. The officer was outnumbered 4 to one, the 4 occupants were standing beside the vehicle at the time of the search, and one of them could conceivably have reached inside the vehicle. The lone officer would have had to abandon the vehicle to take the suspects to the police station, risking tampering by a passersby.

Respondent here was not an occupant of the vehicle when arrested. He was not in a position where he could have access to the vehicle at the time of the search. The police had complete control of the area of the arrest, including Respondent's vehicle. There was no real or probable cause to suspect that either particular evidence of the crime or another individual was inside the truck. Officer Peters' testimony established quite the contrary.

Clearly, the search here was not tied to and justified by the circumstances then present. Under the mandated narrow contruction of the holding in *Belton*, the search which Petitioner seeks to justify cannot be validated.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari to review the judgment of the Supreme Court of the State of Michigan.

Respectfully submitted,

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Dated: April 17, 1985

APPENDIX

Testimony of Kermit Peters

STATE OF MICHIGAN
IN THE DISTRICT COURT
FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-v-

CASE NO. 814070
57280

EARNEST EARLY,
Defendant.

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE Kenneth H. Hempstead, Judge, 51st District Court, Drayton Plains, Michigan, on February 10, 1983.

APPEARANCES:

MR. CRAIG A. WEIER
Appearing on behalf of the People

MR. SANFORD ROSENTHAL
Appearing on behalf of the Defendant

Kristine E. Norlin CER 0670

Testimony of Kermit Peters

(5)

* * *

KERMIT PETERS Called as a witness by the People at about 10:55 a.m., sworn by the Court, testified as follows:

DIRECT EXAMINATION

(6)

BY MR. WEIER:

Q. Would you state your full name for the Record, please?

A. Kermit Peters.

Q. Your occupation?

A. Patrolman City of Pontiac.

Q. How long have you been so employed?

A. Eleven years.

Q. Were you so employed and working in that capacity on August 5, 1981, sir?

A. Yes.

Q. And what were your duties on that date?

A. I was assigned to the Pontiac Surveillance Unit working in conjunction with the Michigan State Police and the FBI.

Q. And in that capacity, did you have occasion to make some surveillance on a certain vehicle during that day?

A. Yes, I did.

Q. And did you see any individual driving that motor vehicle that you were keeping an eye on?

A. Yes, I did.

Q. Did you get a good look at that individual?

A. Yes.

Q. Would you recognize him if you saw him again?

A. Yes.

Q. Is he in the Courtroom today?

A. Yes.

(7)

Q. Would you point him out for the Judge, please?

A. The gentleman in the beige shirt—or beige suit sitting at the defense table.

MR. WEIER: May the Record reflect that the witness has identified the defendant, Earnest Early.

THE COURT: It may.

MR. WEIER: Thank you.

BY MR. WEIER:

Q. Why were you keeping surveillance on Mr. Early, sir?

A. We were involved in a year and a half investigation of an auto parts theft.

Q. A year and a half prior to August 5, 1981, that was a continuing investigation?

A. Yes, sir.

Q. And what, if anything, occurred on August 5, 1981, in the course of that investigation?

A. We began a surveillance at approximately 6 a.m. in the morning at the Ramada Inn in Southfield.

Q. And who were you keeping su. veillance on at that time?

A. Ira Flashner.

Q. What, if anything, did you observe during the course of your surveillance?

A. Somewhere around noon, 12:56, a black pick up operated by Mr. Early arrived aththe Ramada in.

Q. And what, if anything, occurred after his arrival?

(8)

A. Observed Mr. Early and Mr. Flashner together and ultimately Mr. Flashner and Mr. Early left.

Q. All right. And did you have occasion to follow Mr. Flashner and Mr. Early?

A. Yes.

Q. And how did they leave, sir? That area?

A. Mr. Flashner was operating a red van and Mr. Early was operating a vehicle that he came in.

Q. The black pick up truck?

A. Yes.

Q. And where did they go, sir?

A. They ultimately arrived at the Pied Piper Restaurant in Waterford.

Q. Now, pursuant to your investigation of a year and a half prior to this date, did you know what was to transpire at the Pied Piper Restaurant?

A. Yes, there was a sale of parts, auto parts, that Mr. Flashner was under the impression was stolen and the transaction was to take place in the area of Waterford.

* * *

(9)

* * *

Q. Who was the transaction between? The transaction at the Pied Piper?

A. An undercover officer and Mr. Flashner.

Q. And did you, in fact, go the Pied Piper as well?

A. Yes, sir.

Q. And what, if anything, did you observe there, sir?

A. The picke up truck followed the red van. There was a money transaction at the Pied Piper Restaurant parking area.

Q. You saw a money transaction, what do you mean by that, sir?

A. There was a suitcase full of money that was given to the undercover officer.

Q. Who gave it to the undercover officer?

A. Mr. Flashner.

Q. Was Mr. Early present at the time?

A. Yes.

Q. What happened after that?

A. They left the restaurant and ultimately arrived at the Attic Storage Vaults in Waterford.

Q. Would that be at 6535 Highland Road in Waterford, sir?

(10)

A. Yes.

Q. All right. And if you know, what was the purpose of going to that storage vault area?

A. To get the parts that the transaction involved.

Q. The money was for payment of auto parts?

A. Yes.

Q. Those auto parts were allegedly at the Vault Storage facility?

A. Yes.

Q. Who went to the Vault Storage facility?

A. It would be Mr. Flashner, operating the van, and Mr. Early, operating his pick up truck.

Q. And other undercover officers?

A. Yes.

Q. Did you see Mr. Early arrive at the Vault Storage facility?

A. I observed him operate the vehicle and enter into the compound area.

Q. All right. And what, if anything, did you observe after that, sir?

A. The signal was given to converge onto the area.

Q. Who gave that signal?

A. It would have been by the crew leader.

Q. The undercover officer?

A. Yes.

Q. And what was that signal representing, sir?

A. That the parts were being removed from the storage area and (11) placed into the vehicles.

Q. All right. Did you, in fact, go up to the vault storage area where the undercover officer was?

A. Yes.

Q. What did you observe in that area, sir?

A. I observed Officer Colling and—our Strike Force Investigators Colling and Bennel were placing Mr. Flashner and Mr. Early, securing them, by the red van in front of vault number 37.

Q. By securing, do you mean placing them under arrest?

A. Yes.

Q. All right. Did you observe any movement of auto parts prior to that arrest?

A. No, I didn't.

* * *

(12)

* * *

Q. Officer Peters, at the point that Mr. Early was arrested were you able to observe Mr. Early's position with respect to the truck that he arrived in?

A. Yes, he was approximately 15 feet away.

Q. What, if anything, did you do after you observed that apprehension?

A. I was overlooking the area and seeing if there was other individuals, other responsibles, in the area, walked over towards Mr. Early's vehicle.

Q. And what did you do at that point, sir?

A. It was a four-wheel drive vehicle kind of high and I opened the door of the vehicle.

* * *

Q. What, if anything, did you observe upon opening the door of (13) the vehicle, sir?

A. I observed the butt of the handgun.

Q. What was your position upon that observation? Were you inside the vehicle?

A. I had the door open and I was between the door and the seat area. It would be the driver's door.

Q. And where did you observe the butt of the handgun?

A. Under—protruding from underneath the front seat area.

Q. Was it on the floor of the vehicle?

A. Yes.

Q. And when you observed it, did you recognize it immediately as the butt of a handgun?

A. Yes.

Q. What, if anything, did you do when you observed that, sir?

A. I observed it. There was a rag covering the cylinder and barrel area, removed the handgun.

Q. What, if anything, did you do with the handgun after you removed it?

A. I maintained control of it.

Q. By that, what do you mean, sir?

A. Maintained control and placed it on a property tag and it was placed ultimately in a locked evidence closet.

Q. Did you obtain that piece of property for the proceedings today?

A. Yes, I did.

(14)

Q. Do you have it with you today?

A. Yes.

MR. WEIER: May I have this marked as People's Proposed Exhibit Number One, please?

* * *

Q. Mr. Peters, I am now handing you what has been marked as People's Proposed Exhibit Number One. I wonder if you can identify that for the Court, please?

A. Yes, it has my name on it and the property tag number that was assigned to the handgun..

Q. Specifically, what is it that's marked People's Proposed Exhibit Number One?

A. It's a Smith and Wesson six-shot nickel plated pistol.

Q. The marking is on an envelope, is it not? A manilla envelope?

A. Yes.

Q. Did you place the weapon in the envelope?

A. Yes.

(15)

Q. And is the weapon in—you've removed the weapon from the envelope at this point, correct?

A. Yes.

Q. Is the weapon in the same condition today as it was when you first obtained it?

A. Yes, it is.

Q. Is that the weapon you obtained from Mr. Early's—or the vehicle that you observed Mr. Early driving?

A. Yes, and it has my initials on it and the date.

Q. What, if anything, did you do after you discovered the weapon?

A. It was placed on this property tag number and placed in a locked evidence area.

Q. If you could with greater specificity, sir, tell the Court exactly where that weapon was when you first observed it.

A. The driver's—or the seat in the pick up truck is a bench seat area, bench seat, the handgun was underneath where the driver would sit, if his legs were placed on the floor, it would be approximately between the legs, both legs. The front seat—or the seat angles down a little bit. It's not straight up and down, it angles, towards the rear a little bit and it would be approximately maybe five to six—maybe eight inches or so from where the door would be if the door was closed, underneath the seat, and it would be the angle that it comes down, I was able to see the butt of the handgun.

(16)

Q. Sir, had you been in the proper position, would you have been able to observe the butt of the handgun without opening the door of the truck?

A. It's possible, but it would be a contorted position.

* * *

Q. Did you examine the gun when you obtained the gun?

A. Yes.

Q. Was the gun loaded or unloaded?

A. It was loaded.

Q. How many rounds if you recall?

A. As I recall, I believe, there was four live rounds.

* * *

(19)

* * *

CROSS EXAMINATION

BY MR. ROSENTHAL:

Q. Officer Peters, I believe you've stated that you'd seen Mr. Early driving the pick up truck in question. I won't reiterate the description, but I think it was a black one. But you'd seen him driving that, am I correct, sir?

A. Yes, sir.

Q. And you'd also seen a Mr. Flashner?

A. Yes.

Q. Driving a red van, am I correct, sir?

A. Yes.

Q. And this was in at least a couple of instances. One was prior to stopping at the coffee shop or restaurant you've named and then subsequent to that, at the area where the storage bin, I think you've called it, was located, is that correct, sir?

A. Yes.

Q. And you had a view of one person in each vehicle, is that right?

A. Yes, sir.

Q. Is it true, sir, that the reason that you opened the door and looked in the vehicle was to see if there were other people in there in Mr. Early's vehicle?

(20)

A. Yes, sir.

Q. And you were not looking for anything else at that time, if I understand your report correctly, is that right? You were looking for other subjects?

A. It was based on concern for my safety and the safety of the other officers.

Q. But you were looking for someone, right? Assuming there were—you were assuming there might be someone in the vehicle, is that right?

A. Yes, sir.

Q. All right. And yet you had seen the vehicle, it had been under surveillance, and the only one you had seen in the vehicle was Mr. Early, is that correct?

A. Yes, sir.

Q. Mr. Peters—Officer Peters, the weapon that you have described, was this covered by anything?

A. Partly covered, yes, sir.

Q. By what, sir?

A. I believe it was a red rag.

Q. Okay. And what portion of the weapon was under the seat if you recall?

A. The—it would be from the cylinder area to the barrel.

Q. So, that would make up well over two-thirds of it, would it not, sir? From the cylinder forward to the end of the barrel?

(21)

A. Yes, approximately.

Q. All right.

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(24)

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Q. Mr. Peters, you stated on your direct testimony that you had observed the vehicle with Mr. Early in it, is that correct?

(25)

A. Yes, sir.

Q. And he was the only one you saw in it, is that correct, sir?

A. Yes, sir.

Q. And you saw, as I've stated earlier, on more than one occasion you saw him at the stop prior to the coffee shop and then after the coffee shop—

A. Yes.

Q. —on the way to this bin? And was he the only individual in there at the time that you saw?

A. He was the only individual that I saw.

* * *

(26)

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Q. Mr. Peters, you are aware, are you not, that subsequently you and members of the Federal Bureau of Investigation interviewed Mr. Early, am I correct, in length?

A. Yes, I personally didn't view him. They interviewed him. I processed him through Pontiac ultimately.

Q. Well, you also at a later date interviewed him along with the FBI, did you not?

A. With you, sir?

Q. Yes.

A. Yes.

* * *

(27)

* * *

Q. It's a fact, is it not, you could have looked into the vehicle without opening the door to see if there was a human being in there?

(28)

A. It's—yes.

* * *

REDIRECT EXAMINATION

MR. MR. WEIER:

Q. Officer Peters, what period of time elapsed between the time that you saw the defendant drive into the Vault Storage area and the time of the defendant's apprehension if you can recall?

A. Approximately three to five minutes.

Q. How many other individuals were in the area of the Vault Storage area where the defendant was apprehended? All together?

(29)

A. Including police officers?

Q. Yes.

A. Approximately ten.

Q. How many of those ten were police officers?

A. Would have been probably eight.

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